K. A. ABDUL WAHAB v. A. S. SYED AHMAD.

[Court of Appeal (Murray-Aynsley, C.J., Thomson and Storr, JJ.) February 5, 1952]

[Singapore — Civil Appeal No. 10 of 1951]

Contract — Abrogation — Claim for specific performance.

In this case the parties had entered into a contract whereby in return for a sum of money the respondent handed over a business conducted by himself in Robinson Road to the appellant for a period of 18 months. It was agreed that during this period the appellant was to remit a monthly sum to the respondent. At the end of the period the business was to be handed back on payment of the sum previously paid, less any deficiencies on the remittances. It was also agreed that after the expiry of the said period the respondent should give to the appellant sufficient space for his stamp business at a reasonable rent. Subsequently it appeared that the remittances were not made and the respondent returned from India and wanted his business back. There was an arbitration as a result of which a second agreement was entered into. This provided for the holding back of the business on the payment of a sum specified. There was no mention of the retention by the appellant of space to be given by the respondent after the holding back. The respondent applied for specific performance of the agreement but refused to allow the appellant to retain the space occupied by him for his stamp business. The learned trial Judge held that the original agreement (including the premises as to the space to be retained by the appellant) was abrogated by the second agreement and he decreed specific performance.

Held, (1) that there was no express abrogation of the former agreement as to the retention of space by the appellant and there was nothing to show that the performance of the second agreement made the performance of that part of the first agreement impossible; (2) that as the respondent was not willing to perform that part of the agreement and allow the appellant to retain the space for his tobacco business the action for specific performance should have been dismissed.

Case referred to:—

(1) *Morris v. Baron & Co.* (1918) A.C. 25.

COURT OF APPEAL.

David Marshall for the appellant.

N. N. Leicester for the respondent.

The facts appear sufficiently from the judgments.

Cur. Adv. Vult.

Murray-Aynsley, C.J. : — In this case the parties had entered into a transaction of a kind fairly common among Indians in this Colony. The respondent, being desirous of visiting India, in return for a sum of money handed over a business conducted by himself in Robinson Road to the appellant for a period of 18 months. During this period the appellant was to remit to the respondent a sum of Rs. 60 per mensem. At the end of the period the business was to be handed back on payment of the sum previously paid, less any deficiencies on the remittances. Stock was to be taken over at the beginning and end of the period. For this additional sums were to be paid.

There was in addition a clause which has given rise to the present litigation. That clause reads as follows:—

"4. It has been agreed that after the expiry of the said period A. Syed Ahmad (the respondent) shall give to K. A. Abdul Wahab (the appellant) sufficient space for his stamp business at a reasonable rent."

As regards subsequent events, it appears that the remittances were not made and that the respondent returned from India before the expiry of the period of 18 months and wanted his business back. It appears that there was some sort of an arbitration as the result of which a second agreement was entered into. This provides for the handing back of the business on the payment of a sum specified. This was presumably intended to be the sum previously agreed less the deficiencies on remittances. There was no mention of the retention by the appellant of space to be given by the respondent after the handing back.

Though both the agreements used legal jargon they were obviously drafted very inexpertly by persons who were not lawyers.

The subsequent dispute has been whether clause 4 of the original agreement has been abrogated by the subsequent agreement.

The learned Judge who tried the case came to the conclusion that it had been. In the course of his judgment he cited a well known passage from the judgment of Lord Dunedin in the case of *Morris v. Baron & Co.*[1]. In my view the application of that passage leads to a conclusion different from that to which the learned Judge came. In the present case there was no express abrogation of the former agreement as to the retention of space by the appellant and it does not appear that the performance of the second agreement made the performance of that part of the first impossible.

As the respondent was not willing to perform that part of the agreement, I consider that on that ground the action for specific performance should have been dismissed. In the circumstances it is not necessary to consider whether in view of the very bad drafting of the agreements it was possible to decree specific performance at all.

In my opinion the appeal should be allowed. The action for specific performance to be dismissed with costs. The appellant does not ask for costs of the appeal.

Thomson, J. : — I have enjoyed the advantage of reading the judgment of the learned President and am in entire agreement with what he has said. As, however, we are disagreeing with the learned trial Judge I feel I should add a few words of my own.

I agree that the question of whether it was the intention of the parties that the agreement of 6th October, 1950 (the second agreement) should rescind that of 1st November, 1949 (the first agreement) is a question of fact. I have failed, however, to find any material in the case which would support the inference that there was any such intention.

Under the first agreement, the appellant got two things which he could not be deprived of without his own consent. One of these was the use of the respondent's business, if I may use a compendious if perhaps not very accurate expression, for a period of eighteen months, and the second was that after the expiration of that period of eighteen months he was to have on defendant's premises sufficient space for his stamp business at a reasonable rent.

The second agreement dealt with the first of these things but not with the second. By it the appellant gave up approximately seven months' use of the respondent's business in return for agreement as to the exact extent of the financial claims against him under the first agreement which may or may not have been good consideration, a point which I find it unnecessary to decide for the purpose of the present proceedings. In this, and there is no more, I can find nothing to support the inference that the appellant in return for the very slight, if any, consideration that flowed to him under the second agreement intended to give up the right to space for his stamp business which he had acquired under the first agreement in addition to the seven months use of the business which he clearly did intend to give up.

In the circumstances, the respondent not being prepared to carry out the portion of the first agreement relating to the stamp business, is clearly not entitled to specific performance of the second agreement.

I agree that judgment in the Court below should be entered for the defendant, the present appellant, with costs. As appellant does not ask for costs of the appeal I would make no order.

Storr, J. : — I agree with the learned President and have nothing to add.

Appeal allowed.

Action for specific performance dismissed.

RM. THIRUPPATHI CHETTIAR & ANOR. v. TEH KEONG KHENG.

[Orig. Civ. Juris. (Wilson, J.) February 11, 1952]

[Kuala Lumpur — Civil Suit No. 53 of 1950]

Japanese Judgments and Civil Proceedings Ordinance, 1946 — Executors — Agreement for sale of land subject to conditions — Civil Procedure Code, ss. 467(i)(f), 469(a).

During the Japanese Occupation of Malaya, by an agreement in writing dated June 1st, 1945, the administrator with will annexed agreed to sell land subject to his obtaining the approval of the Japanese High Court and subject to the defendant obtaining the approval of the Japanese Governor. The approval of the Court was obtained and an application to the Governor was made but the approval was never received as soon after the Japanese surrendered. In November 1945 the plaintiffs became administrators of the deceased and they sought a declaration that the agreement was null and void and of no effect on the grounds that: (i) the application to sell was made ex parte and no notice of it was served on or given to any person beneficially interested; (ii) the order of the Japanese did not approve the sale to the defendant specifically; and (iii) the approval of the Japanese Governor was not obtained.

Held, that as some beneficiary in India had not been served the order of the Japanese Court was a nullity but the Court had no inherent jurisdiction to set aside orders of the Courts of the Occupying Power and proceedings under the Japanese Judgments and Civil Proceedings Ordinance must be instituted. The order of the Japanese Court approved a sale in general, i.e., to any person and so included the defendant. As the defendant had, without undue delay, applied for the Governor's approval, such approval not having been refused made unnecessary after the Japanese surrender the plaintiffs could not rely on the objection that the approval was not obtained.

Cases referred to :—

(1) *Graig v. Kanssen* (1943) K.B. 256.

(2) *Yeap Lean Seng & Ors. v. Kok Ho Teik & Anor.* (1951) M.L.J. 235.

CIVIL SUIT.

F. G. Charlesworth for the plaintiffs.

H. Y. Teh for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Wilson, J. :— The plaintiffs, as the attorneys of Valliammai Achi and Meenatchi Achi, the widows of one Sethuramaswamy Chettiar, are the administrators in the Federation of Malaya of the Estate of Sethuramaswamy Chettiar. Sethuramaswamy Chettiar died in India on 2nd February, 1941, and appointed his father S. P. L. R. M. Raman Chettiar as his executor. By an Order made by the Supreme Court of the Federated Malay States at Ipoh on the 30th day of June, 1941, it was ordered that Letters of Administration be granted to one Letchumanan Chettiar as